86-588

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AETNA CASUALTY & SURETY COMPANY,
a Connecticut Corporation,
Petitioner,

v.

SMITH PLUMBING, INC., an Arizona Corporation,
dba WHITE MOUNTAIN SUPPLY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

The White Mountain Apache Tribe contracted for the construction of an Indian housing project on its reservation. The Tribe obtained a performance-payment bond from petitioner Aetna Casualty and Surety Company. Under general principles of suretyship and collateral estoppel, the tribe will be bound by any judgment against Aetna on the bond. In a question of first impression a closely divided (3-2) Arizona Supreme Court upheld state court jurisdiction of a materialman's claim against the surety for the tribe.

THE QUESTION PRESENTED IS:

Whether the exercise of state court jurisdiction over tribal sureties for claims which the state court could not entertain against the tribe itself, infringes on tribal self-government where the state court adjudication would bind the tribe, both legally and practically.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Aetna Casualty and Surety Company, a Connecticut corporation, and the respondent, Smith Plumbing Company, Inc., an Arizona corporation, doing business as White Mountain Supply Company.

RULE 28.1

Pursuant to Rule 28.1, the parent company of petitioner, Aetna Casualty and Surety Company, is the Aetna Life and Casualty Company, a Connecticut corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

LIST OF PARTIES..... ii

RULE 28.1..... ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTION..... 2

STATEMENT OF THE CASE..... 2

ARGUMENT..... 10

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI..... 10

CONCLUSION..... 19

APPENDICES:

Appendix A..... 1a-53a

Appendix B.....54a-55a

Appencix C.....56a-84a

Appendix D.....85a-87a

Appendix E.....88a-91a

TABLE OF AUTHORITIES

Case: Page

A&A Concrete v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986) cert denied __ U.S. __ 13, 19

Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) cert denied __ U.S. __, 104 S.Ct. 1701 (1984).....12, 16

Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047, 1051 (9th Cir. 1985) 15-16

Fort Mohave Tribe v. County of San Bernadino, 543 F.2d 1253, 1256 (9th Cir. 1976) cert. denied 430 U.S. 983, 97 S.Ct. 1678 (1977) 12

Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).....13

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45, 102 S.Ct. 894, 905-06 (1982).....17-18

Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 1248 (1981).....13, 14

National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. __, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).....15, 19

Northwest S.D. Production Credit Assoc. v. Smith, 784 F.2d 323, 326 (8th Cir. 1986).....16, 19

Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 97 S.Ct. 2616 (1977)..... 16

TABLE OF AUTHORITIES - Continued

Case Page

Ramey Construction v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982).....13, 17

R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1982).....10, 13

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670 (1978).....12

S. Unique v. Gila River Indian Community, 674 P.2d 1376 (Ariz.App. 1983).....13, 17

United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985).....12

United States v. United States Fidelity & Guarantee, 309 U.S. 506, 512, 60 S.Ct. 653, 656 (1940).....16

U.S. v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941).....16

Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269 (1959).....10-13, 20

STATUTES, RULES AND ORDINANCES:

25 U.S.C. § 476 et seq..... 2
28 U.S.C. § 1257(3)..... 2
Public Law 83-280, §6 (67 Stat. 590).....10

Supreme Court Rules:
Rule 17.1(c).....10

White Mountain Apache Law & Order Code:
Section 21.2. Jurisdiction; Process.....17-18

TABLE OF AUTHORITIES - Continued

MISCELLANEOUS: Page

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 188 comment e; 188(2); 189-191..... 10

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, Ch. 6, § C(3a) at 362 (1982 Ed.)..... 12

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner Aetna Casualty and Surety Company respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Arizona State Supreme Court entered in the above entitled proceeding on July 15, 1986. 1/

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Arizona is reported at 720 P.2d 499 (Ariz. 1986). The Slip Opinion is reprinted in the Appendix hereto, p. 1a, infra.

The Opinion of the Arizona Court of Appeals is reported at 720 P.2d 510 (Ariz.App. 1984). The Slip Opinion is reprinted in the Appendix hereto, p. 56a, infra.

1/ Though petitioner Aetna Casualty and Surety Company is the nominal party before the Court, the White Mountain Apache Tribe pursuant to a tribal council resolution to indemnify Aetna, has borne the cost of representation since 1980.

JURISDICTION

The Judgment and En Banc Opinion of the Arizona Supreme Court was entered May 28, 1986. A timely Motion for Reconsideration was filed June 12, 1986 and was denied July 15, 1986. This Petition for Writ of Certiorari is filed within ninety (90) days of that date.

The jurisdiction of this Court to review the Judgment of the Arizona Supreme Court is invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

The White Mountain Apache Tribe is a tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 et seq., and occupies a reservation in east central Arizona, known as the Fort Apache Indian Reservation. In 1963 the tribal council created the White Mountain Apache Housing Authority pursuant to a requirement of the Indian Housing Division of the United States Department of Housing and Urban Development (HUD) in order to receive financial

assistance from HUD to build low-income housing on its reservation. The Housing Authority is a tribally created entity and has the power to contract and to borrow money from HUD for the purpose of developing housing for its tribal members on the reservation.

In 1968 the tribal council created the White Mountain Apache Development Enterprise (Development Enterprise) for the purpose of undertaking construction projects on the reservation. Development Enterprise is an economic subsidiary of the White Mountain Apache Tribal Government. In 1978 the Housing Authority entered into a general construction contract with the tribe dba Development Enterprise to build four low-income housing projects financed by HUD.

Pursuant to HUD regulations, Development Enterprise was required to obtain a general contractor's performance-payment bond for each construction contract. Four such bonds were obtained from petitioner Aetna Casualty and Surety Company. The provisions of the

bonds are on standard form documents prepared by HUD and they bind the tribe as general contractor and its surety, Aetna, to the Indian Housing Authority, as owner of the projects, in the amount of the original contract sums. The bonds also contain the standard conditions guaranteeing payment of wages and materialmen on the projects.

The tribe was required by Aetna to pass a council resolution agreeing to indemnify Aetna for any payments made pursuant to the performance-payment bond in the event that it failed to pay all project labor and material costs.

The tribe dba Development Enterprise then entered into a subcontract with G,S&D Plumbing, a private non-tribal business, to supply all plumbing materials and labor for installation in the housing projects. Respondent Smith Plumbing Company, Inc. (Smith), a wholesale plumbing supplier in Lakeside, Arizona, outside the reservation boundaries, supplied G,S&D with plumbing supplies for the

Indian Housing Projects on open account for a number of months.

A dispute in respect to alleged non-payment of plumbing supplies arose between the tribe, G,S&D and Smith culminating in an action filed by Smith in the United States District Court for the District of Arizona against G,S&D Plumbing, the White Mountain Apache Tribe as general contractor, and Aetna.

The action was dismissed for lack of subject matter jurisdiction.

Smith then filed an action in the Arizona Superior Court against the Tribal Housing Authority on the basis of unjust enrichment, and against the Housing Authority and Aetna on the performance-payment bond.

Aetna and the Housing Authority, represented by the tribe's general counsel, filed a Motion to Dismiss the Complaint for lack of personal and subject matter jurisdiction.

This motion was denied by the trial court. 2/

The tribe was then allowed to intervene in the action to assert the federal interests which are the subject of this Petition. Some months later Smith voluntarily dismissed the action as to the Housing Authority only.

Thereafter, the trial court dismissed the action as to Aetna and the tribe holding that it lacked jurisdiction over the tribe and its agencies and that the action against Aetna could not proceed in the absence of the Indian Housing Authority. See p. 85a, infra.

Smith appealed but challenged only the dismissal as to Aetna. Concluding that Smith had waived any claim of error in the trial court's dismissal of the tribe, the Arizona

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2/ This motion raised for the first time in the State Court proceedings the federal question whether the State Superior Court could properly exercise jurisdiction over an Indian tribe's surety for alleged non-payment by the tribe of a materialman to a reservation housing construction project. See p. 88a, infra.

Court of Appeals affirmed that portion of the trial court's order. See p. 63a, infra. The court, however, reversed the dismissal as to Aetna holding that the action could proceed against Aetna without joinder of the tribal enterprise.

The Court of Appeals rejected Aetna's argument that an action in state court against the tribe's surety on the performance-payment bond, in fact, constituted a suit against the tribe prohibited by the federal doctrine of tribal sovereign immunity and the proscription against state infringement of tribal self-government. Instead, the Court of Appeals concluded that the suit by Smith was "in essence . . . a suit by a non-Indian corporation on a third party bond issued by another non-Indian corporation." See, pp. 71a-72a, infra.

The court found no basis for preemption of state court jurisdiction over what it characterized as "a private cause of action in contract between two non-Indian parties", nor

any infringement upon tribal self-government. See p. 73a, infra.

It further held that Aetna, the tribe's surety, could not raise the defense of tribal immunity from suit in state court as that defense was not jurisdictional but personal, and therefore, fell within the exception to the general rule of surety law that a surety may raise any defense available to the principal. 3/ See pp. 78a-83a, infra.

The Arizona Supreme Court granted review and affirmed and supplemented the Decision of the Arizona Court of Appeals. The majority agreed with the Court of Appeals that by hearing the merits of the case, the state court would not usurp the legitimate exercise of tribal court jurisdiction, violate the

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3/ The Court of Appeals suggested that if Aetna sought indemnification against the tribe in tribal court for any judgment of the State Court, the tribe could simply raise the defense of sovereign immunity as a defense. This suggestion is unacceptable to Aetna and the tribe. See p. 70a., infra.

doctrine of tribal sovereign immunity or infringe upon tribal self-government.

Two of the five justices vigorously dissented on the grounds that the majority both misconstrued the ultimate facts and disregarded federal Indian policy and the decisions of this Court concerning tribal sovereign immunity and the proscription against state infringement of tribal self-government. See pp. 35a-53a, infra.

As a practical and legal matter, the Decision of the Arizona Supreme Court will uniformly hale Indian tribes into state court to adjudicate the liability of their sureties thereby adjudicating the nature and extent of their own liability for reservation construction projects. 4/

4/ Smith's claim clearly arises from a reservation construction project: (1) the contract between the tribal housing authority and the tribe as general contractor; (2) the subcontract between the tribe and G,S&D Plumbing; (3) the surety bond; (4) the joint and direct check agreement between the tribe

(Footnote Continued)

ARGUMENT

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Abject failure of the Arizona Supreme Court in this case of first impression to apply the infringement test articulated by this Court in Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269 (1959), creates a pressing need for granting this Petition. 5/

(Footnote Continued)
and Smith; and (5) the construction of the Indian housing projects, were all executed and performed within the exterior boundaries of the Fort Apache Indian Reservation. See R.J. Williams v. Fort Belknap, 719 F.2d 979, 985 (9th Cir. 1983) [held location highly significant when reservation construction project concerned a specific physical thing; court applied RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 188 comment (e); 188(2); 189-191 (1971)]

5/ Rule 17, Supreme Court Rules, "Jurisdiction On Writ of Certiorari,":

> ".1. A review on writ of certiorari. . . will be granted only when there are special and important reasons therefor. . ."
>
> "(c) When a state court. . . has decided an important question of federal law which has not been, but should be, settled by this Court,
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> (Footnote Continued)

Substantial construction by tribal contractors is ongoing throughout Indian country. Left in tact, the majority opinion compels that the liability of an Indian tribe's surety, and as a legal and practical matter, the liability of a tribe itself, will be determined in state court.

In Williams v. Lee, supra, a non-Indian operator of a general store on the Navajo Indian Reservation brought suit against Indians in state court to collect for goods purchased on credit. This Court held that:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence, would infringe on the rights of the Indians to govern themselves. 358 U.S. at 223, 79 S.Ct. at 272 (citations omitted)

Thus, the Williams test resolved jurisdictional conflicts by providing that a

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or has decided a federal question in a way in conflict with applicable decisions of this Court."

state's authority stops where tribal self-government would be affected. See Fort Mohave Tribe v. County of San Bernadino, 543 F.2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1678 (1977). 6/

Courts have consistently applied the Williams v. Lee "infringement test" to resolve conflicts between state court and tribal court jurisdiction. 7/

6/ As noted by this Court in Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269 (1959), the State of Arizona has not assumed civil jurisdiction over Indian tribes and their members as permitted under Pub.L. No. 83-280, §6, 67 Stat. 590, and therefore, has only limited power to determine matters to which a tribe is a party or in which it has an interest. See generally, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, Ch. 6, §C(3a) at 362 (1982). Consequently, any state attempt to assert jurisdiction over a tribe or its interests must be closely scrutinized. United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985).

7/ See, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670 (1978); Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 1701 (1984) (off-reservation vendor of

(Footnote Continued)

The Ninth Circuit in R.J. Williams v. Fort Belknap Housing Authority, 719 F.2d 979, 983 (9th Cir. 1983) applied the Williams v. Lee infringement analysis and observed that the question of whether a particular assertion of state jurisdiction will infringe

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(Footnote Continued)
motor vehicles must comply with tribal court order to repossess on reservation); S. Unique v. Gila River Indian Community, 674 P.2d 1376 (Ariz.App. 1983) (off-reservation vendor of herbicide cannot sue in state court to collect debt); R.J. Williams Company v. Fort Belknap Housing Authority, 719 F.2d 979, 983 (9th Cir. 1983) (no state court jurisdiction over dispute arising from reservation construction project); Ramey Construction Company v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) (federal court lacks jurisdiction over dispute arising from reservation construction project); A & A Concrete v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986) cert. denied, ___ U.S. ___ (1986) (tribal court proper forum to adjudicate dispute arising from reservation construction project); Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985); and Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 1248 (1981) (tribes have sovereign power to exercise civil jurisdiction over non-Indians "who enter [into] consensual relationships with a tribe or its members through commercial dealing, contracts, leases or other arrangements.").

upon tribal self-government generally arises in one of two situations:

> First, if a state or federal court resolves a dispute which was within the province of the tribal courts or of other non-judicial law applying tribal institutions, that court would infringe upon the tribe's right to adjudicate controversies arising within it. Second, if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body, tribal self-government is drawn directly into the controversy. R.J. Williams Company v. Fort Belknap Housing Authority, supra, at 983 (citation omitted, emphasis applied). See also, Montana v. United States, 450 U.S. at 564-65, 101 S.Ct. at 1257-58. (Emphasis added)

There is no doubt that the dispute between Smith and petitioner Aetna is a dispute which involves or determines "an act fairly attributable to the tribe as a governmental body" because the ultimate party responsible for payment of the claims in this case is the tribe. State court adjudication of the nature and extent of the liability of the tribe's surety actually adjudicates the nature and extent of the tribe's liability.

Thus, by taking jurisdiction of the claim filed by Smith against Aetna, Arizona courts will effectively compel tribal agencies to litigate in state court all the issues which determine the nature and amount of the tribe's ultimate liability for the materialman's claim. It is impossible under these facts to avoid the conclusion that state assumption of jurisdiction infringes upon the tribe's right of self-government.

The majority opinion fails to discuss this point and simply characterizes the case as one "of a non-Indian materialman suing a non-Indian surety on a performance-payment bond". See p.33a. infra. 8/ As the dissenting

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8/ The Arizona Supreme Court's majority Opinion sidesteps the infringement test entirely by erroneously holding that tribal sovereign immunity is a personal rather than jurisdictional defense. It is well established that tribal sovereign immunity is jurisdictional in nature. See, e.g., National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. ___, 105 S. Ct. 2447, 85 L.Ed.2d 818 (1985: Chemehuevi Indian Tribe v. California State Board of

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opinion aptly observes "actually, this is a case in which a non-Indian materialman is suing a non-Indian surety on a bond to obtain a judgment which the Indian tribe itself must ultimately pay." See pp. 46a-47a, infra. (Emphasis supplied by Justice Feldman).

Smith knowingly provided materials to be used by a subcontractor for installation in a tribal project in Indian country; [9/] and

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(Footnote Continued)
Equalization, 757 F.2d 1047, 1051 (9th Cir. 1985, citing Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 97 S.Ct. 2616 (1977); United States v. United States Fidelity and Guarantee Company, 309 U.S. 506, 512, 60 S.Ct. 653, 656 (1940); Northwest S.D. Production Credit Association v. Smith, 784 F.2d 323 (8th Cir. 1986), citing U.S. v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941) (Latter two cases involve sovereign immunity of the United States).

9/ The majority opinion makes much of the fact that the materialman was located off the reservation and sold the materials for installation into the reservation. Overwhelming authority precludes state court jurisdiction to collect in state court against a tribe for non-payment even when the vendor is located off the reservation. See, Babbitt Ford v. Navajo Tribe of Indians, 710 F.2d 587 (9th Cir. 1983); S. Unique v. Gila
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therefore, Smith knew that he was entering into a commercial relationship with an Indian tribe and that the tribal court would have power to exercise civil authority over him. 10/ See, Merrion v. Jicarilla Apache Tribe,

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(Footnote Continued)
River Pima-Maricopa Indian Community, 674 P.2d 1376 (1983); Ramey Construction Company v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982), (non-Indian contractor sued tribe and its surety for breach of contract in federal court; held: barred by doctrine of sovereign immunity).

10/ The jurisdictional section of the tribal code, part of the record in this case, states in applicable part:

"Section 21.2 Acts submitting to Jurisdiction; Process:

> A. Any person, whether or not a member of the White Mountain Apache Tribe or resident of the Fort Apache Indian Reservation, who in person or through an agent commits any of the acts hereinafter enumerated, thereby submits such person, and, if an individual his personal representative, to the jurisdiction of the White Mountain Apache Tribe as to any cause of action arising from the doing of such acts:
>
> (1) the transaction of doing business within the reservation; . . .
>
> (4) contracting to insure any person,

(Footnote Continued)

455 U.S. 130, 144-45, 102 S.Ct. 894, 905-06 (1982); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).

As the dissenting opinion aptly observes, Smith could have sued the subcontractor, G,S&D Plumbing, and still avoided jurisdiction in tribal court. Aetna does not contest the fact that a debt action on an open account brought by a non-Indian materialman against a non-Indian subcontractor properly belongs in the state court. However, Smith instead sued Aetna, the tribe's surety, in an action on the payment bond for a tribal project in Indian country.

(Footnote Continued)
property or risk located within the reservation at the time of contracting;

(5) contracting with a resident member of the White Mountain Apache Tribe or the White Mountain Apache Tribe for the sale or purchase of any goods or services knowing such contract is to be performed on or from within the Fort Apache Indian Reservation." (Emphasis added)

When Smith sued the tribe's surety, it directly and ultimately implicated the tribe as the ultimate source of the payment of the judgment which it sought in state court. 11/

CONCLUSION

The court's decision, if left unchanged, will render a nullity the federal policy establishing tribal sovereign immunity from suit in state court and most importantly, the proscription against state infringement of tribal self-government. This includes the right of Indian tribes to be judged civilly

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11/ This Court in National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. __, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), emphasized that the tribal court should decide in the first instance whether it has jurisdiction over an action arising on a reservation. In accord, Northwest S.D. Production Credit Association v. Smith, 784 F.2d 323 (8th Cir. 1986) at p. 326; A & A Concrete v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986) (non-tribal concrete subcontractor denied relief in federal district court against tribe arising out of concrete subcontract on reservation due to failure to exhaust tribal court remedies).

liable in their own courts.

Knowing full well that any direct suit against the tribe would be prohibited by the application of the infringement test established by this Court in Williams v. Lee, supra, Smith filed his action in state court naming only the tribe's surety, a stratagem condoned by the majority opinion issued by the Arizona Supreme Court.

For the foregoing reasons, this Petition for Certiorari should be granted. If the petitioner is correct in urging that the Arizona State Court has no jurisdiction to resolve Smith's claim against the tribe's surety, the matter should be remanded to the Arizona Supreme Court for appropriate disposition in the tribal court.

RESPECTFULLY SUBMITTED,

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